Supreme Court, U.S.
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No. 95-102

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ALMA TORREBLANCA DE AGUILAR, ET AL.,

Petitioners,

—against—

THE BOEING COMPANY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT DELTA AIR LINES, INC.

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QUESTION PRESENTED

Whether the court of appeals properly concluded that federal subject matter jurisdiction exists where petitioners demanded "a sum not to exceed $50,000 per decedent" in their state court complaint but where the same petitioners in previous actions demanded damages in excess of $50,000 for the same claims, where petitioners' demand violates a state statute which prohibits pleading a specific amount of damages and where the petitioners failed to establish that they were authorized to limit damages to $50,000 as legal heirs or legal representatives of the estates.

RULE 29.1 STATEMENT

Respondent Delta Air Lines, Inc. has no parent companies or any subsidiaries which are not wholly-owned.

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BRIEF IN OPPOSITION OF RESPONDENT DELTA AIR LINES, INC.

OPINIONS BELOW

The opinion of the court of appeals (Appendix, *infra*, 1a-21a)[1] is reported as *De Aguilar v. Boeing Co.*, 47 F.3d 1404 (5th Cir. 1995). The two opinions of the district court (Appendix, *infra*, 22a-34a) are unreported. A prior opinion of the Fifth Circuit Court of Appeals with respect to the claims of the petitioners is reported as *De Aguilar v. Boeing Co.*, 11 F.3d 55 (5th Cir. 1993). The earlier decision of the Fifth Cir-

[1] Respondent reproduced the opinions of the courts below as an appendix to this brief because petitioners in their appendix incorrectly retyped and omitted portions of those opinions.

cuit will be referred to in this brief as *De Aguilar I* and the decision of the Fifth Circuit in this action below will be referred to in this brief as *De Aguilar II*.

STATEMENT OF THE CASE

This action was commenced under the Texas survival statute, § 71.021 of the Texas Civil Practices and Remedies Code, seeking damages on behalf of the estates of 69 decedents killed in the crash of Mexicana Airlines ("Mexicana") flight 940 on March 31, 1986 en route from Mexico City to Puerto Vallarta, Mexico. The Boeing 727 aircraft crashed shortly after take-off from Mexico City, killing all persons aboard the aircraft.

The underlying facts of the accident have been set forth in several prior decisions. An agency of the Mexican government investigated the accident, concluding that a tire explosion in the aircraft's wheel well resulted in an in-flight fire which disabled critical aircraft systems and caused the airplane to break-up in mid-air. *De Aguilar v. Boeing Co.*, 806 F. Supp. 139, 140 (E.D. Tex. 1992), *aff'd*, 11 F.3d 55 (5th Cir. 1993).

The survival claims asserted on behalf of the estates of the same 69 decedents involved in this action have previously been litigated and dismissed in numerous courts throughout the United States on the ground of *forum non conveniens*. The following is a brief summary of each of the prior actions,[2] concluding with the decision of the court of appeals in this action (*De Aguilar II*).

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[2] A chart (Appendix, *infra*, 35a-39a) identifying the decedents named in each of the actions arising out of the crash was annexed as Exhibit "U" to the Affidavit of respondent Boeing's counsel, Richard C. Coyle, and was set forth in the record below at pages 422-427.

1. The *Rodriquez* Action

The first wrongful death action ("the *Rodriguez* action") was commenced in Bexar County, Texas, in June 1986 by the surviving relatives of 16 decedents, all Mexican nationals. All of the decedents named in the original *Rodriguez* petition were named in the petition in *De Aguilar I* and in this action (*De Aguilar II*). The *Rodriguez* action was removed by Mexicana to the United States District Court for the Western District of Texas. The Boeing Company ("Boeing") moved to dismiss the action on the ground of *forum non conveniens*. The court dismissed plaintiffs' claims against both Mexicana and Boeing on January 23, 1987 on the ground of *forum non conveniens*. *Rodriguez v. Mexicana de Avion, S.A.*, 20 Av. Cas. (CCH) 17,983 (W.D. Tex. 1987), *aff'd mem.*, 843 F.2d 498 (5th Cir.), *cert. denied*, 488 U.S. 826 (1988).

2. The *Penasco Garcia* Action

In March 1987, while the *Rodriguez* action was still pending, another group of plaintiffs ("the *Penasco Garcia* plaintiffs") suing on behalf of approximately 72 predominantly Mexican decedents, commenced similar actions against Mexicana, Boeing, Delta Air Lines, Inc. ("Delta"), The B.F. Goodrich Company ("B.F. Goodrich") and Western Airlines in the Western District of Texas and in state courts in Illinois and California.[3] Sixteen of the decedents named in *De Aguilar I* and in the present action also were named in the Illinois *Penasco Garcia* case, and of those sixteen, fourteen were also named in the *Penasco Garcia* action in Texas.

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[3] Boeing's chart (Appendix, *infra*, 35a-39a) indicates minor differences in the decedents named in the three different *Penasco Garcia* actions. Sixty-five of the decedents were named in all three *Penasco Garcia* actions, seven decedents were named in both Texas and Illinois but not California and four decedents were named in the California action who were not also named in the Texas or Illinois actions. Two of the *Penasco Garcia* decedents had previously been named in the *Rodriguez* action.

Mexicana removed the Illinois and California actions to the appropriate federal courts on the ground that Mexicana was a "foreign state" within the meaning of the Foreign Sovereign Immunities Act of 1976. 28 U.S.C. § 1603 *et seq.* The Western District of Texas action was voluntarily dismissed by plaintiffs and the action in the Central District of California was voluntarily dismissed by plaintiffs against all defendants except Mexicana.

All defendants in the action in the Northern District of Illinois moved for dismissal on the ground of *forum non conveniens* and Mexicana additionally moved for dismissal under the Foreign Sovereign Immunities Act. The court granted defendants' motion on September 21, 1987:

> We conclude that Mexico, not U.S. District Court, is the appropriate forum given that all plaintiffs are Mexican citizens and residents. The accident occurred and was investigated in Mexico with the result that most if not all of the witnesses and necessary exhibits are in that country. We adopt the well reasoned opinion of Judge Garcia, of the Western District of Texas, of January 23, 1987. Dismissal is premised upon the same conditions as imposed by Judge Garcia.

Penasco Garcia v. Mexicana de Avion, No. 87 C. 3920, slip op. at 2 (N.D. Ill. Sept. 21, 1987).

In the action pending in the Central District of California, in which only Mexicana remained as a defendant, the district court denied the motion to dismiss based upon *forum non conveniens* and Foreign Sovereign Immunities Act grounds. Mexicana filed a petition for Writ of Mandamus in the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed the district court and remanded the case with instructions to dismiss for lack of jurisdiction pursuant to the Foreign Sovereign Immunities Act. *Compania Mexicana de Aviacion, S.A. v. United States District Court*, 859 F.2d 1354, 1360 (9th Cir. 1988).

3. The *Estavillo* Action

Also in March 1987, a group of plaintiffs, some of whom also were named in the *Rodriguez* and *Penasco Garcia* actions, filed an action ("the *Estavillo* action") in state court in Los Angeles, California against Mexicana, Boeing and others on behalf of the estates of 69 decedents named in *De Aguilar I* and in the present action as well as 9 other decedents. Plaintiffs served the petition on Mexicana only, and Mexicana removed the action to federal court. The court eventually dismissed all of the unserved defendants and, after the Ninth Circuit ruled in *Compania Mexicana De Aviacion, S.A. v. United States District Court*, 859 F.2d at 1354, dismissed Mexicana on the ground of foreign sovereign immunity. *Esperanza Estavillo Dias v. Compania Mexicana de Aviacion, S.A.*, No. CV 01792, slip op. at 2 (C.D. Cal. Nov. 28, 1988).

4. The *Wolf* Action

In March 1989, alleged beneficiaries of the same 69 foreign decedents who were named in *De Aguilar I* and are named in the present action, *De Aguilar II*, filed suit against the present respondents in King County, Washington, Superior Court. The sole named plaintiff in that action ("the *Wolf* action") was a Washington State attorney named Bruce Wolf who was appointed special administrator of the decedents' estates. The 69 *Wolf* decedents were all part of the earlier dismissed *Estavillo* action in Los Angeles.[4]

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[4] In March 1989, six months after the Ninth Circuit decided *Compania Mexicana de Aviacion, S.A. v. United States District Court*, 859 F.2d 1354 (9th Cir. 1988), plaintiff Bruce Wolf brought an action against Mexicana only in the Superior Court of Washington State for King County as the personal representative of the estates of the same 69 decedents named in *De Aguilar I* and this action. Mexicana removed the *Wolf* action to federal court and, in September 1989, moved to dismiss plaintiffs' claims based on the *res judicata* effect of the Ninth Circuit's decision. Plaintiff then voluntarily dismissed the Washington action against Mexicana.

On January 19, 1990, the *Wolf* action was dismissed on Boeing's motion on the ground of *forum non conveniens*. On May 20, 1991, the Washington Court of Appeals affirmed the dismissal, and the Washington Supreme Court denied review on October 2, 1991. *Wolf v. Boeing Co.*, 61 Wash. App. 316, 810 P.2d 943, *review denied*, 117 Wash. 2d 1020, 818 P.2d 1098 (1991).

5. *De Aguilar I*

Claims on behalf of the estates of the same 69 decedents named in this action and in the *Wolf* action were next asserted in an action filed in the 60th Judicial District Court of Jefferson County, Texas on December 5, 1991. Defendants, Boeing, B.F. Goodrich, The Goodyear Tire & Rubber Company ("Goodyear"), Delta and Parker Hannafin Corporation removed the action to the United States District Court for the Eastern District of Texas. Plaintiffs thereafter moved to remand and, in support of their motion, their counsel submitted two affidavits purporting to limit each plaintiff's claim to less than $50,000. The district court denied plaintiffs' motion. *De Aguilar v. Boeing Co.*, 790 F. Supp. 693 (E.D. Tex. 1992), *aff'd*, 11 F.3d 55 (5th Cir. 1993).

Boeing thereafter moved to dismiss the action on the ground of *forum non conveniens*. The district court granted the motion and a final judgment dismissing the action was filed on September 22, 1992. *De Aguilar v. Boeing Co.*, 806 F. Supp. 139 (E.D. Tex. 1992), *aff'd*, 11 F.3d 55 (5th Cir. 1993).

The Fifth Circuit Court of Appeals affirmed the rulings of the district court and rejected plaintiffs' contention that the action should be remanded for an insufficient amount in controversy based on the post-removal affidavits of plaintiffs' counsel purporting to limit damages not to exceed $49,000 per plaintiff. *De Aguilar I*, 11 F.3d 55 (5th Cir. 1993). The Fifth Circuit concluded that "it is facially apparent that damages sought by the plaintiffs here exceed $50,000." *Id.* at 57.

The court concluded alternatively that even if the amount in controversy were not "facially apparent," the affidavits of plaintiffs' counsel were rebutted by "published precedent showing that damages in the instant case and in similar cases would probably exceed $50,000 per plaintiff" and "evidence that the plaintiffs in this action claimed damages of up to $5,000,000 in other courts for the same injuries." *De Aguilar I*, 11 F.3d at 58.

6. The *Pardo* Action Presently Pending in Mexico

Claims arising from the crash are presently pending against Mexicana in an action entitled *Pardo v. CIA Mexicana de Aviacion, S.A. de C.V.*, Action 137/88 (D. Mexico). Several of the plaintiffs in this action are parties in the Mexican action.

7. This Action (*De Aguilar II*)

Failing to defeat federal diversity jurisdiction by utilizing post removal affidavits of counsel, claims on behalf of the same 69 decedents dismissed in *De Aguilar I* were again asserted in this action which was filed in the 60th Judicial District Court, Jefferson County, Texas (the same court in which the petition was filed in *De Aguilar I*) on November 5, 1992. Unlike the petition in *De Aguilar I* in which plaintiffs did not plead a specific amount of damages, in *De Aguilar II*, those same plaintiffs, petitioners herein, specifically alleged damages of not more than $50,000 per decedent. The action was removed and the Eastern District of Texas once again denied petitioners' motion to remand (and supplemental motion to remand) and granted defendants' motion to dismiss based on *forum non conveniens* (Appendix, *infra*, 22a-23a). Petitioners appealed both orders. The Fifth Circuit Court of Appeals affirmed. *De Aguilar II*, 47 F.3d 1404 (5th Cir. 1995). Petitioners filed their petition for writ of certiorari on July 7, 1995.

In summary, claims asserted on behalf of the Mexicana flight 940 decedents have been dismissed on numerous occasions prior to their dismissal by the court of appeals below. *De Aguilar I*, 11 F.3d 55 (5th Cir. 1993), *aff'g*, 806 F. Supp. 139 and 790 F. Supp. 693 (E.D. Tex. 1992); *Rodriguez v. Mexicana de Avion, S.A.*, 20 Av. Cas. (CCH) 17,983 (W.D. Tex. 1987), *aff'd mem.*, 843 F.2d 498 (5th Cir.), *cert. denied*, 488 U.S. 826 (1988) (all 16 decedents in the *Rodriguez* action are named in the present action); *Penasco Garcia v. Mexicana de Avion*, No. 87 C. 3920 (N.D. Ill. Sept. 21, 1987) (16 of the *Penasco Garcia* decedents are named in this action); *Wolf v. Boeing Co.*, No. 89-2-06281-0, Judgment of Dismissal at 5-6 (Super. Ct. Wash. Jan. 19, 1990), *aff'd*, 61 Wash. App. 316, 810 P.2d 943, *review denied*, 117 Wash. 2d 1020, 818 P.2d 1098 (1991) (plaintiffs in *Wolf* represented the same 69 decedents named in *De Aguilar I* and the present action). Moreover, claims on behalf of the estates of the 69 decedents also were dismissed in the Central District of California on the ground that plaintiffs failed to serve their complaint within 120 days (and as against Mexicana under the Foreign Sovereign Immunities Act). *Esperanza Estavillo Dias v. Compania Mexicana De Aviacion, S.A.*, No. CV 01792, slip op. at 2 (C.D. Cal. Nov. 28, 1988). Finally, the *Pardo* action, which is pending in Mexico City, Mexico against Mexicana, names six decedents who also are named in the action before this Court.

REASONS FOR DENYING THE WRIT

A. The Court of Appeals Properly Concluded That Federal Subject Matter Jurisdiction Exists in This Action

Petitioners seek to avoid federal jurisdiction and another *forum non conveniens* dismissal by placing an illusory cap on the amount of damages demanded in their complaint to a sum below the requisite amount in controversy. *See De Aguilar I*,

11 F.3d at 58; *De Aguilar II*, 47 F.3d at 1408.[5] Petitioners believe that they will avoid a *forum non conveniens* dismissal if they can prevent the removal of this action from the Texas state court because they filed their complaint during the limited period of time in which the doctrine of *forum non conveniens* was abolished in Texas.[6]

Petitioners' reliance on *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938), to shield these claims from federal jurisdiction is misplaced. In *St. Paul Mercury*, plaintiff commenced an action in the state court seeking $4,000 in damages. Defendant removed the action based on diversity (at the time, the minimum amount in controversy for federal jurisdiction was $3,000). Plaintiff thereafter amended the complaint and, although the amended complaint also demanded $4,000, plaintiff annexed an exhibit to the amended complaint alleging that plaintiff's actual damages were only $1,380.89. The district court entered judgment for $1,162.98 and plaintiff appealed. The court of appeals concluded that the action should have been remanded for failure to meet the statutory minimum amount in controversy requirement. This Court reversed and held that the defendant was "entitled to

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[5] Petitioners' complaint demands damages "not to exceed $50,000 per decedent." Petitioners' Appendix, A78. Rule 47(b) of the Texas Rules of Civil Procedure provides that "[a]n original pleading . . . shall contain . . . (b) in all claims for unliquidated damages only the statement that the damages sought are within the jurisdictional limits of the court."

[6] As the Fifth Circuit Court of Appeals correctly noted in both *De Aguilar II*, 47 F.3d at 1408, and *De Aguilar I*, 11 F.3d at 56, petitioners contend that the decision of *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 498 U.S. 1024 (1991) created an opportunity for them to avoid another *forum non conveniens* dismissal. The court in *Dow* held that Texas state courts no longer recognized the doctrine of *forum non conveniens* in wrongful death actions. The statute was ultimately modified by the Texas legislature to allow *forum non conveniens* dismissals in actions commenced on or after September 1, 1993. Tex. Civ. Prac. & Rem. Code Ann. § 71.051 (1994). This action and *De Aguilar I* were both filed before the statute was modified.

invoke the jurisdiction of the Federal court, and a reduction of the amount claimed after removal did not take away that privilege." *St. Paul Mercury*, 303 U.S. at 296.

Petitioners incorrectly rely on a single sentence in *St. Paul Mercury* to support their erroneous contention that the amount of damages set forth by a plaintiff in a state court complaint absolutely controls for purposes of determining the minimum amount in controversy:

> If [plaintiff] does not desire to try his case in the Federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove.

303 U.S. at 294 (footnote omitted); *see* petitioners' brief at 25.

The *St. Paul Mercury* decision, however, establishes that the amount demanded in the complaint does not control for purposes of determining whether federal jurisdiction exists where it appears to a "legal certainty" that the claim seeks less than the requisite amount to satisfy the minimum amount in controversy requirement.

> The rule governing dismissal for want of jurisdiction in cases brought in the Federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. . . . [I]f, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed or if, from the proofs, the Court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed. Events occurring subsequent to the institution of suit which reduce the

> amount recoverable below the statutory limit do not oust jurisdiction.

St. Paul Mercury, 303 U.S. at 288-290 (footnotes omitted).

Petitioners contend that the "legal certainty" test applies only where the complaint is filed in federal court and they allege a conflict among the circuits as to a defendant's burden to establish that removal from state court is proper. Petitioners' brief at 25-27. Petitioners are correct to the extent that "[o]pinions regarding the defendant's burden of proof begin to diverge where a defendant seeks to remove a case where the plaintiff has specifically claimed *less* than the federal amount-in-controversy requirement." *Gafford v. General Elec. Co.*, 997 F.2d 150, 157 (6th Cir. 1993); *compare Gafford*, 997 F.2d at 158 (preponderance of the evidence standard) and *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993), *reh'g, en banc, denied*, 1993 U.S. App. LEXIS 17,385 (7th Cir. July 13, 1993) ("Defendants seeking removal may meet that burden by a preponderance of the evidence, *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 [ ] (1936) which we take to mean proof to a reasonable probability that jurisdiction exists") (footnote omitted); and *Garza v. Bettcher Industries, Inc.*, 752 F. Supp. 753, 763-64 (E.D. Mich. 1990) (preponderance of the evidence standard adopted) with *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994) ("defendant must prove to a legal certainty that plaintiff's claim must exceed $50,000").

Although courts have applied different standards to a defendant's burden on removal, the decisions in *De Aguilar II*, *Gafford*, *Shaw*, *Garza* and *Burns* demonstrate that despite a plaintiff's demand of less than the requisite amount in controversy for federal jurisdiction, an action is properly removed where the defendant establishes that the amount in controversy exceeds $50,000. Accordingly, the view advanced by petitioners at pp. 25-26 of their brief, that removal is always improper where a plaintiff limits damages below the

requisite amount of controversy in a state court complaint, is not followed by any court.

The court of appeals properly concluded that respondents met their burden of establishing that federal jurisdiction exists in this action. At the outset, petitioners' demand in the complaint is meaningless because it violated Rule 47(b) of the Texas Rules of Civil Procedure which prohibits plaintiffs from pleading specific amounts in cases of unliquidated damages. *De Aguilar II*, 47 F.3d at 1412. The court of appeals reasoned:

> [t]hese new rules have created the potential for abusive manipulation by plaintiffs, who may plead for damages below the jurisdictional amount in state court with the knowledge that the claim is actually worth more, but also with the knowledge that they may be able to evade federal jurisdiction by virtue of the pleading. Such manipulation is surely characterized as bad faith.

De Aguilar II, 47 F.3d at 1410; *see also Gafford v. General Elec. Co.*, 997 F.2d 150, 157-58 (6th Cir. 1993). Accordingly, petitioners' attempt to limit their recovery to $50,000 is illusory because petitioners' recovery in state court would not be limited to this amount.[7]

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[7] If this action were remanded, the state court would simply disregard the petitioners' artificial limitation on damages. *See e.g., In the Matter of Shell Oil Co.*, 970 F.2d 355 (7th Cir. 1992). In *Shell Oil*, plaintiff sued for a sum in excess of $15,000 but less than $50,000 contrary to an Illinois statute which precluded pleading specificity of damages. The district court noted that the pleading violated the Illinois pleading rules precluding such specificity but the district court remanded the action based on a post-removal affidavit purporting to limit damages. The Seventh Circuit issued a writ of mandamus directing the district court to rescind its order remanding the action. Acknowledging that the initial pleading of less than $50,000 could have been stricken from the petition by the state court, the court of appeals held, "the factual allegations of the complaint, and not empty words setting an illusory cap on damages, inform the jurisdictional inquiry." *Id.* at 356.

Moreover, petitioners' demand in the complaint also is illusory because these petitioners have asserted the same claims in numerous prior actions where they demanded more than the requisite amount in controversy.[8] Accordingly, the court properly concluded that the respondents met their burden of establishing that federal jurisdiction is proper. *De Aguilar II*, 47 F.3d at 1412 ("it is facially apparent that the damages rise to a level above $50,000").

The decisions on which petitioners rely are distinguishable because, unlike respondents in this action, defendants in those actions failed to meet their burden that the minimum amount in controversy exceeded $50,000. *See Laughlin v. K-Mart Corp.*, 50 F.3d 871 (10th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3068 (U.S. July 7, 1995) (No. 95-40); *Gaus v. Miles, Inc.*, 980 F.2d 564 (9th Cir. 1992); *Burns v. Windsor Ins. Co.*, 31 F.3d 1092 (11th Cir. 1994).

In *Laughlin*, the complaint alleged that the amount in controversy was in excess of $10,000 for each of the two claims and the notice of removal did not refer to an amount in controversy. *Laughlin*, 50 F.3d at 873. The Tenth Circuit held that:

> [t]he amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal . . . . The burden is on the party requesting removal to set forth, in the notice of removal itself, the '*underlying facts* supporting [the] assertion that the amount in controversy exceeds $50,000.' *Gaus v. Miles, Inc.*, 980 F.2d 564, 567 (9th Cir. 1992).

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[8] As the Fifth Circuit Court of Appeals noted in *De Aguilar I*, 11 F.3d 55, 58 (5th Cir. 1993), "the same plaintiffs in this action pled damages up to $5,000,000 in other forums for the same injuries." Moreover, the plaintiffs in the *Pardo* action pending in Mexico claim substantial damages including at least $75,000 for pre-impact pain and suffering.

Laughlin, 50 F.3d at 873 (citation omitted). The *Laughlin* court determined that the action should be remanded because, although defendant set forth facts alleging that the amount in controversy exceeded the jurisdictional minimum of $50,000 in its jurisdictional brief, defendant failed to include any of these facts in its notice of removal. *Id.* The court of appeals in this action held that respondents established "in their notice of removal that the amount in controversy exceeded $50,000." *De Aguilar II*, 47 F.3d at 1407.

Similarly, in *Gaus v. Miles, Inc.*, 980 F.2d 564, 565 (9th Cir. 1992), plaintiff filed an action in the state court seeking damages "in excess of $10,000." Defendant removed alleging in the removal petition that "the matter in current controversy . . . exceeds the sum of $50,000." *Id.* The court determined that the action should be remanded because the defendant "offered no facts whatsoever" to support federal jurisdiction. *Id.* at 567.

Petitioners also rely on *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1093 (11th Cir. 1994). In *Burns*, plaintiff filed an action in state court seeking "not more than $45,000" but admitted to the federal court that "she may, if circumstances change" amend the complaint to seek more damages. The defendant removed and the district court denied plaintiff's motion to remand. The Eleventh Circuit vacated and remanded, holding:

> [b]ecause removal is only permissible when plaintiff's claim could have been filed in federal court originally, we must look to plaintiff's claim to determine whether removal was appropriate. Plaintiff's complaint specifically requests $45,000 in damages. Therefore, no jurisdiction exist[s] on the face of plaintiff's claim. So, the critical question is to what extent must defendant prove jurisdiction exists despite plaintiff's express claim to less than the minimum jurisdictional sum?

> We believe the defendant's burden of proof must be a heavy one . . . . We will not assume—unless given reason to do so—that plaintiff's counsel has falsely represented, or simply does not appreciate, the value of his client's case.

Id. at 1095.

The *Burns* court held that defendant had not met its burden of establishing that, notwithstanding the limited amount of damages demanded in the complaint, the minimum amount in controversy was sufficient to confer federal jurisdiction at the time of removal. The reasoning in *Burns* differs from the Fifth Circuit in this action in the extent of the burden on defendant to establish that removal is proper. In *Burns*, the court held that defendant "must prove to a legal certainty that plaintiff's claim must exceed $50,000." *Id.* at 1095. The *Burns* court relied on the Fifth Circuit's decision in *Kliebert v. Upjohn Co.*, 915 F.2d 142 (5th Cir. 1990), *vacated for reh'g en banc*, 923 F.2d 47 (5th Cir.), *appeal dism'd per settlement*, 947 F.2d 736 (5th Cir. 1991).

The court of appeals in this action rejected the standard it previously articulated in *Kliebert* because that standard fails to "protect defendants from plaintiffs who seek to manipulate their state pleadings to avoid federal court while retaining the possibility of recovering greater damages in state court." *De Aguilar II*, 47 F.3d at 1411. To prevent petitioners from successfully engaging in such a bad faith manipulation of their pleadings, the court of appeals below properly concluded that the amount of plaintiff's claim controls "unless the defendant can show by a preponderance of the evidence that the amount in controversy is greater than the jurisdictional amount." *De Aguilar II*, 47 F.3d at 1412.

The difference in the burden on defendant as enunciated in *Burns* and by the Fifth Circuit in *De Aguilar II* does not provide a basis to grant the writ in this action, however, because even the *Burns* court acknowledged that where a plaintiff's

counsel falsely represented the value of the case, the defendant has met its burden of establishing that removal is proper. *Burns*, 31 F.3d at 1095. Petitioners' prior claims seeking more than the minimum amount in controversy in numerous other fora constitutes the type of bad faith effort to manipulate their state pleadings, *see De Aguilar II*, 47 F.3d at 1411, that would not be tolerated under any standard. Accordingly, the court of appeals properly concluded that the respondents established that petitioners' claims exceed $50,000 and the decisions relied upon by petitioners do not support their contention that there is a conflict among the circuits which should be resolved by granting the writ in this action.

B. The Court of Appeals Properly Held That Petitioners Were Not Authorized to Limit the Recovery of the Estates of the Decedents

The court of appeals properly concluded not only that respondents established that the amount in controversy exceeds $50,000, but also that petitioners were unable to show that their recovery would not exceed $50,000. *De Aguilar II*, 47 F.3d at 1412.

> [A] plaintiff, in a case for unliquidated damages, cannot, absent a further showing, avoid removal by pleading for damages under the jurisdictional amount where a state rule prevents such pleading and where defendants are able to show that it is facially apparent that the amount in controversy exceeds $50,000.

Id. at 1413.

The attempt of petitioners to cap their damages at $50,000 is thus illusory not only because the demand violates Rule 47(b) of the Texas Rules of Civil Procedure and because petitioners have demanded far more than $50,000 in previous actions, but also because petitioners did not make a "further showing" that removal was improper by establishing that they are the legal representatives or legal heirs authorized to limit

the damages recoverable by the estates. *De Aguilar II*, 47 F.3d at 1414-15.

1. The Fifth Circuit Properly Held That Petitioners Failed to Establish That They are the Legal Representatives of the Estates

Petitioners alleged in the complaint that they are the legal representatives of the estates of the decedents and brought this action pursuant to Section 71.021 of the Texas Civil Practices and Remedies Code, the Texas survival statute.[9] Petitioners attached to their complaint an affidavit of one of their attorneys stating that petitioners agreed to an irrevocable cap on recoverable damages. *De Aguilar II*, 47 F.3d at 1407. Respondents attempted to ascertain whether the affidavit of counsel constituted a binding and irrevocable limitation on the damages of the respective estates because it was not clear from the affidavit whether the petitioners had been appointed legal representatives of the estates and whether petitioners had authorized their counsel to make such a binding and irrevocable admission. *Id.* Petitioners refused to confirm that they had been appointed by a qualified court to be the legal representatives of the estates and, thereafter, conceded that they brought this action only as legal heirs and not as legal representatives. *Id.* at 1407, 1414-15.

Based on the foregoing, the Fifth Circuit properly concluded that petitioners "abandoned" their claim as the legal representatives of the estates. *De Aguilar II*, 47 F.3d at 1414-15. Petitioners offered no proof that they are the legal representatives of the estates of decedents and, accordingly, they do not have the authority to pursue and limit these claims to $50,000. *See Bozeman v. Folliott*, 556 S.W.2d 608, 614 (Tex.

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[9] Tex. Civ. Prac. & Rem. Code § 71.021(b) provides: "A personal injury action survives to and in favor of the heirs, legal representatives, and estate of the injured person. The action survives against the liable person and the person's legal representatives."

Civ. App. 1977); *Martinez v. Angerstein*, 517 S.W.2d 811, 816 (Tex. Civ. App. 1974); Texas Probate Code §§ 178, 189.

The court of appeals also affirmed the district court's rejection of petitioners' argument that under Texas pleading rules, respondents waived their right to challenge the authority of petitioners to act as legal representatives because respondents did not file a plea in abatement or a verified denial. Federal pleading rules, rather than state pleading rules, apply in federal court. *See Bowers v. Firestone Tire & Rubber Co.*, 800 F.2d 474, 479 (5th Cir. 1986) (once an action is removed from state court to federal court, Federal Rules of Civil Procedure govern pleading requirements); *Consolidated Cigar Co. v. Texas Commerce Bank*, 749 F.2d 1169, 1174 (5th Cir. 1985).

Respondents complied with Rules 11 and 12 of the Federal Rules of Civil Procedure and, as such, were not required to file a plea in abatement or verified denial in this action. *See Sneed Shipbuilding, Inc. v. Spanier Marine Corp.*, 125 F.R.D. 438 (E.D. Tex. 1989). Accordingly, respondents did not waive their right to challenge the authority of petitioners to bring this action as the legal representative of the estates and to limit the damages sought on behalf of the estates of decedents.

2. The Fifth Circuit Properly Held That Petitioners Failed to Establish That They Have the Authority to Limit These Claims as Legal Heirs on Behalf of the Estates

The requirements to pursue a claim as the legal heir of an estate are different from the requirements to pursue a claim as the legal representative of an estate. *See Handley v. City of Seagoville*, 798 F. Supp. 1267, 1270 (N.D. Tex. 1992). Legal heirs can prosecute a survival cause of action on behalf of an estate if they allege (1) there is no administration of the estate pending, (2) there is no necessity for administration of the estate, and (3) they are the only heirs of the decedent. *Lozano*

v. Smith, 718 F.2d 756, 773 n. 38 (5th Cir. 1983); *Cole v. Franklin Life Ins. Co.*, 93 F.2d 620, 624 (5th Cir. 1937); *Frazier v. Wynn*, 472 S.W.2d 750, 752 (Tex. 1971); *see also Martinez v. Angerstein*, 517 S.W.2d 811, 816-17 (Tex. Civ. App. 1974) (Plaintiff failed to offer evidence that she was the sole heir of husband's estate); *Sustaita v. Valle*, 38 S.W.2d 638, 640-41 (Tex. Civ. App. 1931) (Plaintiff did not offer evidence that she was the sole surviving heir of her father's estate).

Under Texas law, therefore, all potential legal heirs to an estate are indispensable parties to a survival action involving a decedent's estate. *See Martinez*, 517 S.W.2d at 816; *Phillips v. Teinert*, 493 S.W.2d 584, 585 (Tex. Civ. App. 1973). The Fifth Circuit properly held that petitioners did not allege any of the requisite elements in this action and, as a result, petitioners cannot compromise the claims of the estates. *De Aguilar II*, 47 F.3d at 1415.

It is undisputed that petitioners are not the sole heirs of decedents named in this action. In fact, petitioners dropped 42 of the heirs, which includes all 20 minors, who were named as plaintiffs in the *De Aguilar I* complaint. *De Aguilar II*, 47 F.3d at 1415. Moreover, petitioners also dropped the one hundred "Doe" plaintiffs named in the previous complaint. *Id.* The Fifth Circuit reasoned that the inclusion of "Doe" plaintiffs in the complaint in *De Aguilar I* indicates that there exists uncertainty as to the identity of all the heirs. *Id.* Counsel for petitioners conceded that all legal heirs were not represented in this action and that prior complaints in other actions noted additional survivors would be named at a later date. *Id.* Because petitioners failed to establish that all legal heirs are parties to this action, they lack the authority as legal heirs under Texas law to limit the damages recoverable on behalf of the estates of the decedents.

The Fifth Circuit properly applied Texas law in determining whether petitioners have the authority as legal heirs to limit the damages sought by the estates. The court correctly

held that in a diversity action a federal court must apply the choice-of-law rules of the state in which it sits. *De Aguilar II*, 47 F.3d at 1413. Petitioners brought this action in Texas pursuant to the Texas survival statute, but seek to apply Mexican law to the issue of their authority to maintain and compromise the claims of the decedents. The Fifth Circuit correctly applied the most significant relationship test and, after careful analysis, held that under Texas law petitioners lack the authority as legal heirs to bring this action on behalf of the estates of decedents under the Texas survival statute. *Id.* at 1413-1414.

Moreover, even if Mexican law applied to this issue, petitioners have not demonstrated that an individual heir can compromise a claim on behalf of all of the persons who have an interest in a decedent's estate. Accordingly, petitioners failed to provide support for their contention that under Mexican law they would have the authority to pursue these claims and limit damages to $50,000.

Based on the foregoing, the Fifth Circuit properly held that petitioners failed to meet their burden in establishing that they are the legal representatives or legal heirs authorized to limit the damages recoverable to the estates of the decedents.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-5333

March 7, 1995

Alma Torreblanca DE AGUILAR, *et al.*,

Plaintiffs-Appellants,

—v.—

BOEING COMPANY, *et al.*,

Defendants-Appellees.

Benton Musslewhite, Mary Blair Martin, Houston, TX, Mitchell A. Toups, Weller & Green, Beaumont, TX, Dennis C. Reich, Reich & Binstock, Houston, TX, for appellants.

Howard Louis Close, Orgain Bell & Tucker, Beaumont, TX, Richard C. Coyle, Seattle, WA, for Boeing Co.

Gerald Leigh Bracht, Laura Jean Ware, Mayor Day Caldwell & Keeton, Houston, TX, for BF Goodrich Co./Goodyear Tire.

Michael J. Holland, Condon & Forsyth, New York City, for Delta Air Lines.

Don Swaim, George Steven McCall, Kern & Wooley, Irving, TX, for Parker Hannifin Corp.

Appeal from the United States District Court for the Eastern District of Texas.

Before SMITH AND EMILIO M. GARZA, *Circuit Judges*, and STAGG,* *District Judge*.

JERRY E. SMITH, *Circuit Judge*:

Plaintiffs, the relatives of persons who died in an airline crash in Mexico, appeal the district court's denial of their motion to remand to state court, the failure of the district court to strike or sever the third party complaint by defendant Boeing Company ("Boeing"), and the dismissal on the ground of *forum non conveniens* ("f.n.c."). Concluding that the district court did not err, we affirm.

I.

On March 31, 1986, a Mexicana Airlines jet crashed near Mexico City, killing everyone on board. An investigation concluded that a tire exploded in the wheel well while the plane was in flight, causing an in-flight fire that eventually caused the plane to explode.

II.

Relatives and personal representatives of the estates of those who died filed several lawsuits throughout the United States and in Mexico. In every lawsuit filed in the United

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* District Judge of the Western District of Louisiana, sitting by designation.

States, the action has been either voluntarily dismissed by the plaintiffs or dismissed on the basis of foreign sovereign immunity or f.n.c.[1]

Plaintiffs have been determined to find a United States forum in which to try their case. In November 1992, they filed this action in Texas state court, claiming to be the personal representatives of the estates of each decedent and the legal heirs of the decedents pursuant to the Texas Survival Statute, TEX.CIV.PRAC. & REM.CODE ANN. § 71.021 (Vernon 1986). The plaintiffs charged negligence and products liability against Boeing, B.F. Goodrich, Goodyear Tire and Rubber, Delta Airlines, and Parker Hannifin Corporation. Under TEX.R.CIV.P. 47, plaintiffs were not allowed to plead for a specific amount of damages.[2]

After defendants removed the case to federal court in the Eastern District of Texas, plaintiffs filed affidavits executed by certain plaintiffs and by the plaintiffs' attorneys, purporting to limit the damages they were seeking, and moved to remand on the ground that the $50,000 jurisdictional amount requirement was not satisfied. *See* 28 U.S.C. § 1332. The district court denied remand, holding that the affidavits were irrelevant because "jurisdiction attaches at the time of removal, and subsequent events do not oust the court of jurisdiction." *De Aguilar v. Boeing Co.*, 790 F.Supp. 693, 694 (E.D.Tex.1992). Subsequently, however, this court decided *Asociacion Nacional de Pescadores v. Dow Quimica de Colombia S.A.* ("ANPAC"), 988 F.2d 559 (5th Cir. 1993), *cert. denied*, ___U.S. ___, 114 S.Ct. 685, 126 L.Ed.2d 653 (1994), concluding that post-removal affidavits sometimes

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[1] *See de Aguilar v. Boeing Co.*, 11 F.3d 55 (5th Cir.1993); *Compania Mexicana de Aviacion, S.A. v. United States Dist. Court*, 859 F.2d 1354 (9th Cir.1988); *Rodriguez v. Mexicana de Avion, S.A.*, 1987 WL 275695 (W.D.Tex 1987), *affd mem.*, 843 F.2d 498 (5th Cir.), *cert. denied*, 488 U.S. 826, 109 S.Ct. 76, 102 L.Ed.2d 53 (1988); *Wolf v. Boeing Co.*, 61 Wash.App. 316, 810 P.2d 943, *review denied*, 117 Wash.2d 1020, 818 P.2d 1098 (1991).

[2] The rule states, "An original pleading . . . shall contain . . . (b) in all claims for unliquidated damages only the statement that the damages sought are within the jurisdictional limits of the court."

can be relevant where the jurisdictional amount question is unresolved. *Id.* at 565.

The district court *a quo* further noted that, even if it had considered the affidavits relevant, the complaint named one hundred unknown plaintiffs who were not bound by the affidavits, and plaintiffs' counsel could not bind minor beneficiaries (constituting approximately twenty of the named plaintiffs) to judgments in wrongful death suits without leave of court. *De Aguilar,* 790 F.Supp. at 695. The claims later were dismissed on f.n.c. grounds. *De Aguilar v. Boeing Co.,* 806 F.Supp. 139 (E.D.Tex.1992). The court held that direct estoppel barred the plaintiffs from relitigating the f.n.c. dismissal. Courts in Illinois, Washington, and the Western District of Texas had already ruled on this matter. *Id* at 142. Alternatively, the court found that under traditional f.n.c. criteria, the Eastern District of Texas would not be a convenient forum. *Id* at 142-43.

This court affirmed the denial of the motion to remand and the dismissal on estoppel and f.n.c. grounds. *De Aguilar v. Boeing Co. ("de Aguilar I"),* 11 F.3d 55 (5th Cir.1993). We held that the district court had properly disregarded the affidavits because it was "facially apparent" that the damages sought by each plaintiff exceeded $50,000. *Id.* at 57. Alternatively, we noted that the attorney affidavits were not unrebutted by evidence from the defendants. *Id.* at 57-58. These points distinguished *de Aguilar I* from *ANPAC.*

ANPAC involved claims that were not facially likely to exceed the jurisdictional amount. *ANPAC,* 988 F.2d at 565. In addition, in *ANPAC,* the only "evidence" the defendants produced to rebut the plaintiffs' attorneys' affidavits was the original notice of removal, which merely stated that the matter in controversy exceeded $50,000. *Id.* The *de Aguilar I* court noted that the defendants in that case had produced testimonial evidence and published precedent that indicated that the matter in controversy indeed exceeded $50,000. *De Aguilar I,* 11 F.3d at 58.

In the alternative, the plaintiffs in *de Aguilar I* argued that the original notice of removal was invalid because the defen-

dants failed to prove that the amount in controversy exceeded $50,000. We rejected this argument because defendants had shown that plaintiffs had pled damages of up to $5,000,000 in other fora for the same injuries. *Id.*

In the instant case, shortly after the district court had dismissed the original claims, plaintiffs' attorneys filed another petition in state court. In this petition, at issue now, the plaintiffs dropped forty-two of the heirs, including all of the minors, and any mention of unnamed 'Doe" plaintiffs. More importantly, plaintiffs, in apparent violation of TEX.R.CIV.P. 47, described the amount of their claim by specifically alleging that their damages did not exceed $50,000. Plaintiffs attached to the original petition an affidavit of attorney Dennis Reich stating that plaintiffs had agreed to an irrevocable cap on the amount of damages that could be awarded.

After service, defendants attempted to clarify whether Reich's affidavit constituted a binding limitation on the respective estates' damages. Howard Close, counsel for Boeing, sent Reich a letter asking for an amendment to the affidavit, or a new affidavit, in which Reich would attest that the plaintiffs had been appointed the personal representatives of the estates and had expressly authorized Reich to make a binding and irrevocable admission on their behalf.

One of the plaintiffs' attorneys, Mitchell Toups, had a discussion with Close about the proposed amendments to Reich's affidavit. The parties appear to dispute exactly what took place, though both sides agree that plaintiffs' counsel refused to say that the plaintiffs had been appointed by a qualified court as the personal representatives of the estates. According to defendants, Toups also said that none of the plaintiffs' American attorneys had actually talked to the plaintiffs. Plaintiffs claim that the reason they refused to acknowledge that they had been appointed the personal representatives of the estates was that they were suing as heirs, not representatives.

Defendants concluded that the plaintiffs named in the petition were simply *some* of the heirs of the decedents and did not have the authority to limit damages. As a result, defen-

dants once again removed to federal court in the Eastern District of Texas, establishing in their notice of removal that the amount in controversy exceeded $50,000.

Three months after removal, plaintiffs filed a supplemental motion to remand for lack of jurisdiction and attached an affidavit from a Mexican lawyer, Guadalupe Bistrain, who was one of the plaintiffs' attorneys. Bistrain swore that she had received explicit authority from each of the named plaintiffs to limit damages to $50,000. The district court determined that the plaintiffs had not shown the necessary authority to limit damages and ruled that the amount in controversy exceeded $50,000.

Defendants alleged an additional basis for federal jurisdiction. In December 1992, Boeing filed a third party complaint against Mexicana Airlines, which on January 15, 1993, filed a memorandum that claimed status as a "foreign state" under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611. Plaintiffs filed a motion to strike or, in the alternative, sever Boeing's third party claim. The district court denied this motion when it denied the motion to remand. Defendants subsequently moved to dismiss on f.n.c. grounds; the court granted this motion.[3]

III.

Since the crash, plaintiffs have made repeated attempts to locate an American forum. There are actions pending in the Mexican courts also. The Supreme Court of Texas had held that the doctrine of f.n.c. no longer applied in Texas wrongful death actions. *See Dow Chemical Co. v. Alfaro,* 786 S.W.2d 674 (Tex.1990), *cert. denied,* 498 U.S. 1024, 111 S.Ct. 671, 112 L.Ed.2d 663 (1991). The Texas Legislature then overruled *Alfaro. See* TEX.CIV.PRAC. & REM.CODE ANN.

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[3] There is no merit to the plaintiffs' appeal of the f.n.c. dismissal. We affirmed, in *de Aguilar I,* 11 F.3d at 58-59, the dismissal on f.n.c. grounds. Thus, if we decide that there was federal jurisdiction in this case, the f.n.c. dismissal is law of the case.

§ 71.051; *'21' Int'l Holdings v. Westinghouse,* 856 S.W.2d 479 (Tex.App.—San Antonio 1993, no writ). The new statute, however, applies only to causes of action filed on or after September 1, 199?. Thus, plaintiffs obviously prefer Texas state court to federal court, where f.n.c. applies.

IV.

As we have stated, plaintiffs' state court petition averred that they were seeking no recovery in excess of $50,000. During oral argument, plaintiffs characterized their claim as a plea for a specific amount of damages. They argue that *de Aguilar I* was premised on the fact that the complaint in that case "did not specify an amount of damages." *De Aguilar I,* 11 F.3d at 57.

Indeed, strictly speaking, plaintiffs have not alleged a specific amount of damages, as the amount they claim can range from $1 to $50,000. We will treat the claim, however, as one for a specific amount of damages.[4] Plaintiffs have labored to specify one "magic" number in their complaint, i.e. $50,000. We regard such a complaint as more like a claim for one sum rather than a claim for an unlimited or an unspecified amount of damages; to reason otherwise would put form over substance. As a functional matter, plaintiffs are attempting to avoid federal jurisdiction. This goal is the same whether they pick a number such as $49,999 or merely announce a ceiling that, conveniently, is barely within the statutory limit.

Defendants, as on all previous occasions, seek to retain this case in federal court. In general, defendants may remove a civil action if a federal court would have had original jurisdiction. *See* 28 U.S.C § 1441(a). In this particular case, jurisdiction is asserted on the basis of diversity of citizenship. 28 U.S.C. § 1332. The removing party bears the burden of establishing that federal jurisdiction exists. *Gaitor v. Peninsulur & Occidental S.S. Co.,* 287 F.2d 252, 253-54 (5th Cir.1961).

"Unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good

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[4] This critical distinction renders ANPAC inapposite.

faith." St. *Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288, 58 S.Ct. 586, 590 82 L.Ed. 845 (1938). Most discussions of jurisdictional amount in removal cases begin with *St. Paul Mercury.*

In St. *Paul Mercury,* the Court announced the now famous "legal certainty" test for diversity cases: In order for a federal court to decline jurisdiction, "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount." *Id.* at 289, 58 S.Ct. at 590. Many courts have applied the "legal certainty" language to jurisdictional amount questions in remand cases;[5] there is, however, disagreement as to exactly what a plaintiff has to show to a legal certainty to defeat federal jurisdiction.

In *St. Paul Mercury,* the plaintiff originally alleged damages above the jurisdictional amount in state court but amended the complaint in federal court to state less than the required amount. The Court held that the subsequent amendment could not strip the federal court of jurisdiction, provided that the original claim for damages was made in good faith. The "legal certainty" test was articulated in the Court's more general discussion of jurisdiction:

> The intent of Congress drastically to restrict federal jurisdiction in controversies between citizens of different states has always been rigorously enforced by the courts. The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction. Nor does the fact that the complaint discloses the existence of a valid defense to the claim. But if, from the face of the plead-

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[5] *E.g., Hale v. Billups of Gonzales, Inc.*, 610 F.Supp. 162, 164 (M.D.La.1985); *Locklear v. State Farm Mut. Auto. Ins. Co.*, 742 F.Supp. 679 (S.D.Ga.1989).

> ings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed, or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed. Events occurring subsequent to the institution of the suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction.

Id. 303 U.S. at 288-90, 58 S.Ct. at 289-90 (footnotes omitted).

The above discussion and, hence, the legal certainty test, contemplate the "typical" diversity situation.[6] As one court has indicated, the legal certainty test "is explicitly premised on the assumption that the amount in controversy is met by the express allegations of the plaintiff's complaint and is limited in utility to cases in which the plaintiff himself has placed the requisite jurisdictional amount in controversy by requesting damages in excess of the jurisdictional amount." *Garza v. Bettcher Indus., Inc.*, 752 F.Supp. 753, 755 (E.D.Mich.1990).

This court has indicated that the legal certainty test does not apply in a remand situation where the plaintiff has alleged an indeterminate amount of damages. In *de Aguilar I,* we stated that "[w]hen the plaintiff's complaint does not allege a specific amount of damages, the removing defendant must prove by a preponderance of the evidence that the amount in controversy exceeds $50,000." 11 F.3d at 58 (citing *Gaus v. Miles, Inc.*, 980 F.2d 564, 567 (9th Cir.1992); *Garza*, 752 F.Supp. at 763). *See also Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1094 (11th Cir.1994) (noting that in the "typical" removal case "defendant can remove to federal court if he can show, by a preponderance of the evidence, facts supporting jurisdiction").

The question in this case is different from that in both the typical diversity situation and the typical removal situation.

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[6] In a typical diversity situation, the plaintiff files a suit in federal court alleging damages in excess of the jurisdictional amount.

Here, the plaintiffs, in a bold effort to avoid federal court, have specifically alleged that their respective damages will not exceed the jurisdictional amount.

Plaintiffs have correctly cited the provision in *St. Paul Mercury* that a plaintiff who does not "desire to try his case in federal court . . . may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove." 303 U.S. at 294, 58 S.Ct. at 593. The inquiry, however, does not end merely because the plaintiff alleges damages below the threshold. The face of the plaintiff's pleading will not control if made in bad faith.

Moreover, the above statement from *St. Paul Mercury* plainly was premised on the notion that the plaintiff would not be able to recover more in state court than what was alleged in the state court complaint. So, for example, in *Woods v. Massachusetts Protective Ass'n*, 34 F.2d 501 (E.D.Ky.1929), cited in *St. Paul Mercury* in support of the above-quoted passage, the plaintiff sued for an amount under the jurisdictional limit. Under the state provision in that case, "if there had been no removal and an answer had been filed, plaintiff would not have been entitled to judgment for more than [the amount for which plaintiff sued]." *Id.* at 504.[7]

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[7] *See also Iowa Cent. Ry. v. Bacon*, 236 U.S. 305, 309, 35 S.Ct. 357, 358, 59 L.Ed. 591 (1915) (state pleading for less than jurisdictional amount approved where "[t]he state court had authority to determine the effect of the prayer to the petition and it decided that, under the petition, no more than the amount prayed for could be recovered in the action"); *Harley v. Firemen's Fund Ins. Co.*, 245 F. 471, 476 (W.D.Wash.1913) (noting that "the initial pleading, and the only pleading filed in the state court . . . fixes the amount in controversy in this case at [an amount below the jurisdictional amount] and no greater sum can be recovered"); *Maine v. Gilman*, 11 F. 214, 215 (C.C.D.Me,1882) ("In the mode of pleading adopted in Maine the *ad damnum* binds the plaintiff as a maximum, and a judgment for more is erroneous, or, at least, if not technically erroneous would be irregular and improper."); 1A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.157[6], at 133-34 (2d ed. 1993) (stating that plaintiff "may prevent removal by the expedient of suing for less than the jurisdictional amount unless his attempted waiver of the balance is legally ineffective").

The majority of states now, however, have followed the example of FED.R.CIV.P. 54(c) and do not limit damage awards to the amount specified in the ad damnum clause of the state pleading. See Burns, 31 F.3d at 1097 n. 11. In fact, many states, like Texas, have enacted rules that strictly prohibit plaintiffs from pleading for specific amounts in cases of unliquidated damages.

These new rules have created the potential for abusive manipulation by plaintiffs, who may plead for damages below the jurisdictional amount in state court with the knowledge that the claim is actually worth more, but also with the knowledge that they may be able to evade federal jurisdiction by virtue of the pleading. Such manipulation is surely characterized as bad faith. *See Boelens v. Redman Homes, Inc.*, 759 F.2d 504, 507 (5th Cir.1985) (stating that "tactical manipulation [by the] plaintiff cannot . . . be condoned") (quoting *Austwick v. Board of Educ.*, 555 F.Supp. 840, 842 (N.D.Ill.1983)). Likewise, as one treatise has indicated,

> if the prayer for relief must be ignored under applicable principles of law and plaintiff can, therefore, recover more on his state claim than the jurisdictional minimum, the case is removable; and, where plaintiff's cause of action and the relief actually sought clearly involve a controversy in excess of the required amount, removal is not defeated by a monetary prayer for less than the amount.

1A MOORE, *supra*, ¶ 0.158, at 204-05 (footnotes omitted).[8]

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[8] The Seventh circuit has stated:

> *St. Paul* held that a plaintiff may not obtain a remand by amending the complaint to seek less than the jurisdictional amount. This principle has led some courts to hold that removal is proper, although the complaint asks for less than the jurisdictional amount, when state law permits a court to award more and the court is likely to do so if it decides in the plaintiff's favor.

In re Shell Oil Co., 966 F.2d 1130, 1131 (7th Cir. 1992) (citing *Cole v. Freightliner Corp.*, 1991 WL 42163, 1991 U.S.Dist. LEXIS 3408 (N.D.Ill.); *Garza*; *Johnson v. Core-Vent Corp.*, 1990 WL 51253, 1990 U.S.Dist. LEXIS 4225 (N.D.Ill.); *Locklear v. State Farm Mut. Auto. Ins.*

Accordingly, we hold that if a defendant can show that the amount in controversy actually exceeds the jurisdictional amount, the plaintiff must be able to show that, as a matter of law, it is certain that he will not be able to recover more than the damages for which he has prayed in the state court complaint. Such a rule is necessary to avoid the sort of manipulation that has occurred in the instant case.

The exact extent of the burden on the defendant in this situation was addressed by a panel majority of this court in *Kliebert v. Upjohn Co.*, 915 F.2d 142, 147 (5th Cir.1990), *vacated for reh'g en banc*, 923 F.2d 47 (5th Cir.), *appeal dism'd per stipulation of settlement*, 947 F.2d 736 (5th Cir.1991). Having been vacated, *Kliebert* is no longer precedent in this court, but its analysis is useful.

In *Kliebert*, the plaintiffs alleged a specific dollar amount of damages that was less than the federal jurisdictional amount. The panel majority held that to remove, the defendants would have to show that it was legally certain that plaintiffs would recover more than the jurisdictional amount. *Id.* at 146. Thus, the defendants would have to show that "if a jury awarded less than [the jurisdictional amount] the court would be required to grant a new trial." *Id.*

The onerous nature of this burden stands in direct contrast to the analysis of several district courts that have stated the removal inquiry as a type of "converse legal certainty test." Under this formulation, defendant "has the burden of proving that it does not appear to a legal certainty that the claim is actually for less than the requisite amount." *Hale*, 610 F.Supp. at 164. Courts elsewhere have restated the test and required

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Co., 742 F. Supp. 679 (S.D.Ga.1989); *Mutual First, Inc. v. O'Charleys, Inc.*, 721 F.Supp. 281 (S.D.Ala.1989); *Corwin Jeep Sales & Serv., Inc. v. American Motors Sales Corp.*, 670 F.Supp. 591 (M.D.Pa. 1986); *Steele v. Underwriters Adjusting Co.*, 649 F.Supp. 1414 (M.D.Ala.1986); *Hale v. Billups of Gonzales, Inc.*, 610 F.Supp. 162 (M.D.La.1985)). *But see Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1097 (11th Cir.1994) (stating that permitting removal where the plaintiff is not bound by his state pleading but pleads an amount of damages below the jurisdictional amount "would allow state rules of procedure to determine when federal jurisdiction existed" and "could lead to inconsistent application of federal jurisdictional rules") (footnote omitted).

that the defendant show "'that there is a probability that the value of the matter in controversy' exceeds the jurisdictional amount." *Corwin Jeep Sales*, 670 F.Supp. at 595 (quoting *Cunningham v. Ford Motor Co.*, 413 F.Supp. 1101, 1103 (D.S.C.1976)).

In the present case, the district court held that the removing defendant had to establish that there is "some possibility" that the plaintiff could recover over $50,000. This formulation is supported by language from *Foret v. Southern Farm Bureau Life Ins.* Co., 918 F.2d 534, 537 (5th Cir.1990), in which we held that it was not error for the district court to exercise jurisdiction over a case where "the plaintiffs could have recovered more than $50,000."

Both sides argue that the preponderance of the evidence standard announced in *de Aguilar I* should apply in this case. We agree. As the dissenting judge indicated in *Kliebert,* the strict test adopted by the *Kliebert* majority "seems to conflict with our past decisions that have stated that the standard for determining jurisdictional amount should favor 'those parties seeking to invoke the jurisdiction of a federal district court.' " *Kliebert,* 915 F.2d at 148 (Jolly, J., dissenting) (quoting *Opelika Nursing Home v. Richardson,* 448 F.2d 658, 663 (5th Cir. 1971)).

The *Kliebert* standard also fails adequately to protect defendants from plaintiffs who seek to manipulate their state pleadings to avoid federal court while retaining the possibility of recovering greater damages in state court following remand. This court has spoken adamantly of "preventing the plaintiff from being able to destroy the jurisdictional choice that Congress intended to afford a defendant in the removal statute." *Boelens,* 759 F.2d at 507.

We regard, however, the "some possibility" standard applied by the district court and the "converse legal certainty" test, which essentially require that the defendant merely show that plaintiff *could* recover more than the jurisdictional amount, as too permissive. *See Burns,* 31 F.3d at 1092 ("The *possibility* that plaintiff may in the future seek or recover more damages is insufficient to support federal jurisdiction

now.") (emphasis added). Plaintiff is, to some extent, still the master of his own claim. *See, e.g., Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 & n. 7, 107 S.Ct. 2425, 2429 & n. 7, 96 L.Ed.2d 318 (1987); 14A CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3702, at 22 (2d Ed.1985).

Consequently, the plaintiff's claim remains presumptively correct unless the defendant can show by a preponderance of the evidence that the amount in controversy is greater than the jurisdictional amount. The preponderance burden forces the defendant to do more than point to a state law that *might* allow the plaintiff to recover more than what is pled.[9] The defendant must produce evidence that establishes that the actual amount in controversy exceeds $50,000.

Our court has already said, in the instant case, that it is facially apparent that the damages rise to a level above $50,000. *De Aguilar I*, 11 F.3d at 57. As a result, despite the fact that the district court imposed the wrong burden, there is no question that the preponderance burden, had the district court applied it, easily would be met by these defendants. In fact, in accordance with the law of the case principle, this court is bound by what we held in *de Aguilar I*.

So, once a defendant is able to show that the amount in controversy exceeds the jurisdictional amount, removal is proper, provided plaintiff has not shown that it is legally certain that his recovery will not exceed the amount stated in the state complaint. Thus, once the defendant has pointed to an adequate jurisdictional amount, the situation becomes analogous to the "typical" circumstances in which the St. *Paul Mercury* "legal certainty" test is applicable: The defendant has established, by a preponderance, that federal jurisdiction is warranted. At this point, "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." *St. Paul Mercury*, 303 U.S. at 289, 58 S.Ct. at 590.

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[9] Such a holding would render the jurisdictional amount all but meaningless in states with rules analogous to FED.R.CIV.P. 54(c). *See* 14A WRIGHT, *supra*, § 3725, at 426.

We emphasize that this is not a burden-shifting exercise. In light of *St. Paul Mercury*, plaintiff must make all information known at the time he files the complaint.

Plaintiff's "legal certainty" obligation might be met in various ways; we can only speculate, without intimating how we might rule in such case. Plaintiff's state complaint might cite, for example, to a state law that prohibits recovery of damages that exceed those requested in the *ad damnum* clause and that prohibits the initial *ad damnum* to be increased by amendment. Absent such a statute, "[l]itigants who want to prevent removal must file a binding stipulation or affidavit with their complaints; once a defendant has removed the case, *St. Paul* makes later filings irrelevant." *In re Shell Oil Co., 970* F.2d *355, 356* (7th Cir.1992) (per curiam).[10]

V.

The state complaint in this case was filed in Texas, which has the following procedural provision: "An original pleading . . . shall contain . . . (b) in all claims for unliquidated damages only the statement that the damages sought are within the jurisdictional limits of the court." TEX.R.CIV.P. 47(b). Plaintiffs acknowledged during oral argument that their filing violated rule 47(b). Accordingly, there is no state provision

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[10] The Eleventh Circuit has expressed reluctance to allow state rules of procedure to determine when federal jurisdiction exists. *See Burns*, 31 F.3d at 1097. We note, however, the cases that we have cited, especially those mentioned by the *St. Paul Mercury* Court, which expressly reference state procedural rules in the context of removal.

Moreover, while the Eleventh Circuit fears the "inconsistent application of federal jurisdictional rules," we observe that the same "rule" will now hold throughout the circuit. The general principle is that plaintiffs will have to show that that they are bound irrevocably by their state pleadings in these situations. Certainly, plaintiffs who plead for specific damages and who are in states that have procedural rules binding them to their pleadings will satisfy their burden more easily. Others will have the same opportunity to avoid federal court but will have to choose another method to show their commitment to recovery below the federal threshold.

that limits the amount of damages plaintiffs are seeking, or can recover, to the amount they have asked for in the complaint, i.e., an amount not to exceed $50,000. In summary, therefore, a plaintiff, in a case for unliquidated damages, cannot, absent a further showing, avoid removal by pleading for damages under the jurisdictional amount where a state rule prevents such pleading and where defendants are able to show that it is facially apparent that the amount in controversy exceeds $50,000.

In the case *sub judice*, plaintiffs also attached to the original state court petition an attorney affidavit that purported to limit the amount of damages recoverable. The federal district court reasoned, however, that the plaintiffs could not effectively limit the amount of damages they could obtain unless they had the authority to bind the estates by limiting damages. In order to do so, they had to be the legal representatives or legal heirs of the estates.

On this issue, plaintiffs' initial argument is that Mexican law rather than Texas law should apply. Specifically, they assert that under Mexican law, they are the lawful heirs of the decedents and have lawful authority to limit the damages sought by the estates.

In a diversity action, a federal court must apply the choice-of-law rules of the state in which it sits. *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 1021-22, 85 L.Ed. 1477 (1941). According to Texas law, "in all choice-of-law cases, except those contract cases in which the parties have agreed to a valid choice-of-law clause, the law of the state with the most significant relationship to the particular substantive issue will be applied to resolve that issue." *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex.1984).

Texas follows RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, which provides:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Furthermore, section 145 lists the factual matters that a Texas court will consider when applying section 6:

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971); *Crisman v. Cooper Indus.*, 748 S.W.2d 273, 276-77 (Tex.App.—Dallas 1988, writ denied).

Furthermore, the application of the significant relationship test does not "turn on the number of contacts, but more importantly on the qualitative nature of those contacts as affected by the policy factors enumerated in Section 6." *Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex.1979).

Defendants apparently relied upon only Texas cases when arguing before the district court that Texas law should apply, as plaintiffs did not argue that Mexican law should apply on this issue until they filed their motion to remand two months after removal. The district court, however, did address and reject the choice-of-law argument in its memorandum opinion, and we follow suit.

We will first identify all relevant contacts as a Texas court would. *Duncan*, 665 S.W.2d at 421. All defendants conduct business in Texas, the forum is Texas, and the underlying cause of action is based upon Texas law. All of the plaintiffs are from Mexico, all decedents were from Mexico, and the crash itself and the injuries took place in Mexico. There is no particular relationship between the plaintiffs and the defendants.

The matter at issue is whether Texas or Mexican law will be used to determine the extent of plaintiffs' authority to limit damage recoveries for the estates. As noted, plaintiffs plainly are seeking damages under the Texas Survival Statute.

This "particular substantive issue" has nothing to do with the actual alleged tort itself. *Duncan*, 665 S.W.2d at 421 (the law of the place with the "most significant relationship to the particular substantive issue will be applied to resolve that issue"). In other words, the choice-of-law question in this case is unrelated to the conduct and injury underlying the

cause of action in the same way that, for example, the choice of the substantive products liability law of one of the places would be.[11] *See, e.g., Perry v. Aggregate Plant Prods. Co.*, 786 S.W.2d 21 (Tex.App.—San Antonio 1990, writ denied) (products liability law of Indiana applies to conduct and injury occurring in Indiana); *Crisman* (products liability law of Florida applies to conduct and injury occurring in Florida).

The fact that the accident took place in Mexico, or that there was an accident at all, is fortuitous and simply not relevant to our particular choice-of-law decision. Rather, the important fact is that the plaintiffs chose to file a *suit* in Texas under Texas law. Whether the plaintiffs could effectively limit the damage recovery to the estates of the decedents relates more directly to the "procedural" aspects of the suit and not to the substantive portions of the cause of action.[12]

Mexico has no underlying interest in the application of its law to determine who can bring a cause of action or bind the estate in a Texas cause of action. Texas certainly has an interest in requiring those who seek to take advantage of Texas

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[11] Obviously, in a tort case, the locus of the conduct has a greater interest in seeing that its standard of care is applied, because it affects the way that parties tailor their conduct in that state. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145, cmt.d, at 417-18:

> Experience and analysis have shown that certain issues that recur in tort cases are most significantly related to states with which they have particular connections or contacts. So, for example, a state has an obvious interest in regulating the conduct of persons within its territory and in providing redress for injuries that occurred there. Thus, subject only to rare exceptions, the local law of the state where the conduct and injury occurred will be applied to determine whether the actor satisfied minimum standards of acceptable conduct and whether the interest affected by the actor's conduct was entitled to legal protection (see §§ 146- 147).

The particular issue in our case is more akin to the situation where "a court under traditional and prevailing practice applies its own state's rules to issue involving process, pleadings, joinder of parties, and the administration of the trial. . . ." *Id.* at 417.

[12] Strictly speaking, this is not a procedural issue; otherwise, the federal procedural rules would apply.

law to meet certain requirements. In addition, uniformity and predictability in Texas courts would be promoted when deciding who has the authority to pursue actions on behalf of estates. This is a false conflict, and Texas law applies. *See Duncan*, 665 S.W.2d at 422. In this situation, we have no doubt that a Texas court would choose to apply Texas law.

Plaintiffs originally claimed to be the personal representatives and legal heirs of the decedents' estates. Boeing's attempt to amend the Reich affidavit, and the conversations which followed, however, have called this claim into substantial doubt. In fact, plaintiffs appear essentially to have abandoned their claim as personal representatives and instead purport to be plaintiffs' legal heirs.

The plaintiffs can pursue their claims as the individual heirs of the estates under TEX.CIV.PRAC. & REM.CODE ANN. § 71.021 (Vernon's 1986). Legal heirs can sue on behalf of an estate if they allege that "there is no administration [of the estate] pending and no necessity for same and that they are the only heirs (or devisees) of the deceased." *Lozano v. Smith* 718 F.2d 756, 773 n. 38 (5th Cir. 1983); *see also Frazier v. Wynn*, 472 S.W.2d 750, 752 (Tex.1971); *Johnson v. Holly Farms, Inc.*, 731 S.W.2d 641, 647 (Tex. App.—Amarillo 1987, no writ).

Plaintiffs have not alleged any of these elements. They now argue that the district court erred in not requiring the defendants to offer evidence that the above elements could *not* be satisfied. Plainly, though, the rule is that the plaintiffs must affirmatively allege the above elements. *See Johnson*, 731 S.W.2d at 647.

In any event, defendants did offer evidence that the plaintiffs in this case are not the sole heirs. Forty-two persons alleged in *de Aguilar I* to be heirs of the decedents, as well as twenty minors, were dropped as plaintiffs. It appears that known heirs were deleted from this case because plaintiffs knew that they would not be able to limit the damage claim with these heirs as part of the action.[13] The one hundred "Doe" plaintiffs from the first action were also eliminated.

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[13] For example, a court must approve the limiting of a claim when minors are involved.

The inclusion of "Doe" plaintiffs in *de Aguilar I* suggests that the plaintiffs' attorneys were not aware of who all of the heirs were, and the plaintiffs have contended nothing that appears to change this circumstance.

In fact, plaintiffs' attorney acknowledged at oral argument that he does not represent all of the legal heirs. Defendants also argue that in a previous complaint, all of the present plaintiffs and all of the plaintiffs from *de Aguilar I* were included, and the plaintiffs still said that this was only a partial listing and that additional survivors would be named. Plaintiffs plainly have failed to meet the requirements of Texas law to limit the damages recoverable to the estates in this case. As a result, plaintiffs have failed to defeat removal jurisdiction.[14]

The judgment of the district court dismissing the complaint is AFFIRMED.

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[14] As this issue is dispositive, we find it unnecessary to address the issue of Boeing's third party complaint.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

1:92-CV-537

August 11, 1993

ALMA TORREBLANCA DE AGUILAR, *et al.*,

Plaintiffs,

—VS.—

THE BOEING COMPANY, *et al.*,

Defendants.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS BASED ON FORUM NON CONVENIENS

CAME ON TO BE CONSIDERED Defendant The Boeing Company's motion for summary judgment and motion to dismiss on the basis of forum non conveniens, which are joined in by all other defendants and the third-party defendant. After reviewing the motions, the lack of response in opposition, and the pleadings of record, the court is of the opinion that the Defendants' motion to dismiss should be GRANTED and, therefore, the court does not reach Defendants' motion for summary judgment.

On June 8, 1993 this court denied Plaintiffs' motion to remand this case to Texas state court. On July 8, 1993 Boeing

filed a motion for summary judgment based on limitations and in the alternative a motion to dismiss Plaintiffs' claims based on forum non conveniens. Shortly thereafter, all other defendants, Delta Air Lines, Inc., the Goodyear Tire and Rubber Company, the B.F. Goodrich Company, Parker Hannifin Corporation, as well as the third-party defendant, Compania Mexicana de Aviacion, S.A., d/b/a Mexicana Airlines, joined in Boeing's motions.

This case has been dismissed by four other federal courts on the basis of forum non conveniens. In fact, these same plaintiffs were dismissed on that basis by Judge Howell Cobb of the Eastern District of Texas. *Torreblanca de Aguilar v. Boeing Co.*, 806 F. Supp. 139 (E.D. Tex. 1992). Judge Cobb found that direct estoppel precluded Plaintiffs from relitigating the forum non conveniens issue. In the alternative, Judge Cobb ruled the case would be dismissed on an independent determination under the doctrine of forum non conveniens. The court agrees with Judge Cobb's sound reasoning in the previous case. The court adopts that reasoning and results for this case. Because the court finds this is not a proper and convenient forum to try this case, it declines to rule on Defendants' motion for summary judgment.

IT IS, therefore, ORDERED that Defendants' Motion to Dismiss on the grounds of forum non conveniens is GRANTED, and this action is DISMISSED at Plaintiffs' cost.

SIGNED this the 11th of August, 1993.

RICHARD A. SCHELL

Richard A. Schell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

1:92-CV-537

June 8, 1993

ALMA TORREBLANCA DE AGUILAR, *et al.*,

Plaintiffs,

—VS.—

THE BOEING COMPANY, *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDERS DENYING MOTIONS TO REMAND AND MOTION TO STRIKE THIRD PARTY COMPLAINT OR ALTERNATIVELY SEVER THIRD PARTY ACTION

The Plaintiffs have filed a motion to remand, a supplemental motion to remand, and a motion to strike third party complaint or alternatively sever third party action. After reviewing the motions, the responses in opposition, the memoranda in support of the motions and responses, the pleadings of record and attached affidavits, the court is of the opinion that the motions should be DENIED.

BACKGROUND

On March 31, 1986 a Mexicana Airlines passenger jet crashed shortly after takeoff from a Mexico City airport. The crew and all passengers aboard the plane were killed. An investigation conducted by the Mexican government concluded that a tire explosion in the aircraft's wheel well resulted in an in-flight fire that disabled critical aircraft systems and caused the airplane to explode in flight.

Following the crash, relatives of Mexican citizens who perished in the crash filed several different lawsuits in several different state and federal courts in the United States, as well as Mexico. In each lawsuit filed in the United States, the action was either voluntarily dismissed by the plaintiffs, dismissed on the basis of foreign sovereign immunity, or dismissed on the basis of *forum non conveniens*. In fact, a similar lawsuit involving these same defendants and many of the same plaintiffs, was dismissed last year on the basis of *direct estoppel and forum non conveniens* by the Honorable Howell Cobb, also of the Eastern District of Texas. *Torreblanca De Aguilar v. Boeing Co.*, 806 F. Supp. 139 (E.D. Tex. 1992).

On November 5, 1992 relatives of some of the Mexican citizens who perished in the crash (hereinafter "Plaintiffs") filed this lawsuit in the 60th District Court of Jefferson County, Texas. The original petition in state court alleges negligence and product liability claims on behalf of Plaintiffs as personal representatives of the estates or as the legal heirs of the decedents pursuant to the Texas Survival Statute, TEX. CIV. PRAC. & REM. CODE ANN. § 71.021 (Vernon 1992). The petition charges acts of negligence and claims of product liability against The Boeing Company, The B.F. Goodrich Company, The Goodyear Tire and Rubber Company, Delta Air Lines, Inc., and Parker Hannifin Corporation (hereinafter "Defendants"). The petition, in an apparent attempt to defeat diversity jurisdiction, also alleges that Plaintiffs do not seek to recover more that $50,000 per decedent.

Defendants removed the lawsuit to this court. Defendants allege that after conducting an investigation of Plaintiffs' purported damages limitation, they have determined that not all indispensable parties are included as plaintiffs. Thus, Defendants allege the purported limitation is ineffective and cannot defeat diversity jurisdiction.

Plaintiffs then filed their motion to remand. Plaintiffs claim that the damages limitation set forth in their petition limits, to a legal certainty, the amount in controversy to less than $50,000. Plaintiffs also claim that whether they are the legal representatives of the estates of the decedents or the legal heirs entitled to bring these causes of action and limit the amount of damages sought, the case can and should be litigated in state court.

Boeing subsequently filed a third-party complaint against Mexicana Airlines. The third-party complaint alleges that any injuries or damages suffered by Plaintiffs were caused by the acts or omissions of Mexicana. Boeing claims that Mexicana is required to indemnify Boeing from and against any judgment arising out of Plaintiffs' claims against Boeing. Because Mexicana was owned by the government of Mexico, Boeing argues that this third-party complaint, independent of any diversity of citizenship argument, gives the court jurisdiction over this lawsuit pursuant to the Foreign Sovereign Immunities Act of 1976 (hereinafter "FSIA"), 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), and 1602-1611. Mexicana has answered the third party complaint, denying any liability and opposing Plaintiffs' motion to remand on the same basis of jurisdiction under the FSIA asserted by Boeing. Plaintiffs were then granted leave to file a supplemental motion to remand. In the supplemental motion to remand, Plaintiffs included an affidavit signed by their Mexican attorney wherein she states, without further proof, that each plaintiff is "an heir at law and/or personal representative of the respective decedents" and that she has been given explicit authority to limit their damages to $50,000. Plaintiffs have also moved to strike Boeing's third-party complaint alleging that the only reason Boeing has filed a claim against Mexicana is to pre-

vent the lawsuit from being remanded. Plaintiffs have moved in the alternative for a severance of the third-party claim.

ANALYSIS

I. Establishing Federal Jurisdiction

The burden of establishing that federal jurisdiction exists rests upon the party seeking to invoke it. *Gaitor v. Peninsular & Occidental Steamship Company*, 287 F.2d 252 (5th Cir. 1961) *citing Carson v. Dunham*, 121 U.S. 421, 7 S.Ct. 1030, 30 L.Ed. 992 (1887). To invoke the diversity jurisdiction of this court, it must be shown that the matter in controversy exceeds $50,000 and is between citizens of a state and citizens or subjects of a foreign state. 28 U.S.C. § 1332(a)(2). There is no dispute that complete diversity exists here. However, there has been much dispute over the amount in controversy. As the removing parties, Defendants bear the burden of showing that federal jurisdiction exists and must establish that the amount in controversy exceeds $50,000. *Id.* at 253.

II. Legal Certainty Test

The "legal certainty" test governs questions of jurisdictional amount. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845, 848 (1938). Exactly what a removing party must establish to a "legal certainty" to discharge its burden is unclear in the Fifth Circuit. A test was announced in *Kliebert v. Upjohn Co.*, 915 F.2d 142, 146-47 (5th Cir. 1990), *opinion vacated on grant of reh'g en banc*, 923 F.2d 47 (5th Cir.), *dism'd per settlement*, 947 F.2d 736 (5th Cir. 1991). If it had not been vacated, the panel decision in *Kliebert* would have required Defendants to establish to a legal certainty that a successful plaintiff would "recover at least the minimum jurisdictional amount." *Id.* However, a more relaxed standard, one used by Judge Cobb in denying a motion to remand in an earlier lawsuit concerning this same crash, only requires Defendants to prove that there is not a legal certainty that the claim is actually below the jurisdic-

tional amount. *See De Aguilar v. Boeing Co.*, 790 F. Supp. 693, 694 (E.D. Tex. 1992)(hereinafter "De Aguilar I"). In other words, the removing defendant must establish that there is some possibility that the plaintiff could recover over $50,000. Apparently, this is the rule in the Fifth Circuit. *Foret v. Southern Farm Bureau Life Insurance Co.*, 918 F.2d 534, 537 (5th Cir. 1990).

III. Amount in Controversy

Defendants argue that there is certainly a possibility that Plaintiffs could recover over $50,000 for a wrongful death cause of action. Defendants contend that Plaintiffs' damages limitation is ineffective and therefore the court should look to the recovery of typical wrongful death actions in order to determine the amount in controversy. Defendants point to Judge Cobb's ruling, in the earlier-mentioned denial of a motion to remand in *De Aguilar I*, in support of their contention that the amount in controversy is indeed to a legal certainty not less than $50,000. Judge Cobb, by looking to damage awards in similar cases, determined that these same plaintiffs were likely to recover more than $50,000 each if they recovered at all. *De Aguilar I*, 790 F. Supp. at 695.

Plaintiffs argue that they are the masters of their own pleadings and can determine the amount of damages they seek to recover. They argue that the attorney/client relationship controls whether Plaintiffs are bound by their petition and their attorneys' affidavits which state that Plaintiffs seek to recover less than $50,000. Plaintiffs also argue that Defendants have waived their ability to challenge Plaintiffs' authority to bring suit as personal representatives of the decedents' estates because they have not contested Plaintiffs' authority by a verified denial or plea in abatement as required by the Texas Rules of Civil Procedure. Finally, Plaintiffs contend that under Mexican law they are entitled as lawful heirs of the decedents to pursue these claims directly and have the authority to limit the damages sought by the decedent's estates to $50,000.

The court initially observes that generally speaking plaintiffs are the masters of their own pleadings and may determine how much money they seek to recover in a lawsuit. Recognizing this general rule, the Supreme Court has stated that plaintiffs may prevent removal by "resort to the expedient of suing for less than the jurisdictional amount." *St. Paul Mercury Indemnity Co.*, 303 U.S. at 294, 58 S.Ct. at 584, 82 L.Ed. at 851. However, this court recognizes that in order for Plaintiffs to effectively limit their damages they must have the right or authority to bring suit on behalf of the decedents' estates. Thus, the controlling issue is whether Plaintiffs are the legal representatives or the legal heirs entitled to bring suit on behalf of each decedent's estate and to bind the estate by limiting damages.

A. Defendants have not Waived their Ability to Challenge Plaintiffs' Authority to Bring Suit as Personal Representatives

Plaintiffs apparently contend that they bring this lawsuit as both personal representatives *and* as legal heirs. In a memorandum in support of the motion to remand Plaintiffs allege, "[I]n this case, the survival actions were brought by the heirs of decedents." (Plaintiffs' Memorandum In Support Of Motion To Remand, p. 11). However, in the same paragraph, Plaintiffs also argue that Defendants have waived their ability to challenge Plaintiffs' authority to bring suit as personal representatives of the decedent's estates. Plaintiffs apparently argue that under the Texas Rules of Civil Procedure one who purports to be suing as a personal representative need not prove his authority unless challenged by a plea in abatement or verified denial. It is Plaintiffs' position that because Defendants have not filed a plea in abatement or verified denial in this case they have waived their ability to attack the validity of Plaintiffs' authority as personal representatives.

Under the Texas Rules of Civil Procedure, a pleading setting up the matter that the plaintiff does not have the legal capacity to sue must be verified. TEX. R. CIV. P. 93(1); *See Theobold v. Pate*, 542 S.W.2d 460, 464-65 (Tex. Civ. App.—

Tyler, 1976, writ dism'd w.o.j.). In *Johnson v. Holly Farms of Texas, Inc.*, 731 S.W.2d 641, 647 (Tex. App.—Amarillo 1987, no writ), the Amarillo Court of Appeals ruled that plaintiffs suing under the Texas Survival Statute are not required to prove their authority to sue as personal representatives unless challenged by a plea in abatement or verified denial. The Federal Rules of Civil Procedure do not require the verification of the denial of a plaintiff's capacity to sue. The Federal Rules have eliminated any need to verify any pleadings, requiring only that the attorney sign his name to submitted pleadings. FED. R. CIV. P. 11. The court must determine, under the *Erie* doctrine, if the verified denial required under Texas law to contest Plaintiffs' authority to sue is a substantive right requiring compliance by Defendants or if the Federal Rules control the pleading requirements in this case.

This court ruled on a similar *Erie* doctrine issue in *Sneed Shipbuilding, Inc. v. Spanier Marine Corp.*, 125 F.R.D. 438 (E.D. Tex. 1989). In *Sneed Shipbuilding*, the court restated the rule handed down by the Supreme Court in *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), "[I]f the rules do conflict, *Hanna* mandates that the federal rule be applied, even if it changes the outcome, as long as the federal rule is valid in light of due process and the Rules Enabling Act." The court then determined that Federal Rule 11 did not violate due process or the Rules Enabling Act and was to be applied in pleadings situations where the conflicting Texas procedural rules were Texas Rules of Civil Procedure 93(10) and 185. *Id.* at 444.

The case now before the court is similar. The "right" in question in this case seems to be the right on the plaintiff's part to have the defendant swear to his pleading that disputes the plaintiff's authority to sue as a personal representative. Without repeating the analysis of *Sneed Shipbuilding*, the court finds that Defendants are only required to comply with federal pleading requirements and do not need to challenge Plaintiffs' authority to sue as personal representatives by a verified denial or a plea in abatement.

Plaintiffs have offered no proof, other than their Mexican attorney's affidavit, that they are the personal representatives of the respective estates. The court therefore cannot conclude that there is no possibility that the decedents' estates could recover more than $50,000.

B. Authority of Plaintiffs as Legal Heirs to Limit Damages Sought on Behalf of the Estate

Plaintiffs contend that under Mexican Law they are entitled as lawful heirs of the decedents to pursue these claims and have the authority to limit the damages sought by the decedent's estates to $50,000. Defendants allege that under Texas law all potential legal heirs to an estate are indispensable parties to a survival cause of action involving that decedent's estate. Defendants argue that because not all legal heirs are parties to this lawsuit, the damages limitation is ineffective and cannot defeat diversity jurisdiction. To resolve this issue, the court must determine whether Texas or Mexican law should control the extent of a legal heir's authority when bringing a claim on the behalf of a decedent's estate.

"In a diversity action in federal court, a district court is required to follow the choice of law rules of the state in which it sits." *Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242, 249 (5th Cir. 1990) [*citing Klaxon v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 1021-22, 85 L.Ed. 1477 (1941)]. Under Texas law, "in all choice of law cases, except those contract cases in which the parties have agreed to a valid choice of law clause, the law of the state with the most significant relationship to the particular substantive issue will be applied to resolve that issue." *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984). Thus, it is necessary for the court to determine whether Texas or Mexico has the most significant relationship to the ability and authority of a legal heir to sue on behalf of an estate seeking to recover under the the Texas Survival Statute.

In applying the most significant relationship test, the court must identify the relevant state contacts. The following contacts in the state of Texas are present in this case: all defen-

dants conduct business and are amenable to process, the forum providing the legal basis for the cause of action being brought by Plaintiffs is Texas, and the Texas courts system is being utilized to pursue these claims. The following contacts in Mexico are present in this case: all plaintiffs are from Mexico, all decedents were from Mexico, and the crash occurred in Mexico.

"The application of the most significant relationship approach to the resolution of choice of law questions does 'not turn on the number of contacts, but more importantly on the qualitative nature of those contacts as affected by the policy factors enumerated in Section 6 [of the Restatement].' " *Mitchell*, 913 F.2d at 249 [*citing Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex. 1979)].[1] Therefore, after identifying the states with relevant contacts, the court must identify the policies or governmental interests of each state in the controversy in question. *Id.*

In its analysis, the court confines itself to the issue of whether Texas or Mexican law should govern the authority of a legal heir when that heir is attempting to prosecute a survival claim on behalf of a decedent's estate. Given the fact that this case is brought in the state of Texas by foreign plaintiffs seeking to take advantage of the Texas Wrongful Death

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[1] Section 6 of the Restatement (Second) of Conflict of Laws provides,

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Statute, the court finds it hard to conceive of any overriding interest in applying Mexican law. On the other hand there are several significant reasons for applying Texas law.

Texas certainly has an interest in requiring that those seeking to assert claims in its courts meet certain requirements before asserting those claims. For instance, in situations such as this, the courts would spend an inordinate amount of time trying to determine a foreign country's laws regarding who has the authority to prosecute suits on behalf of an estate. Such an undertaking would be difficult and time-consuming. Requiring compliance with Texas law certainly promotes the efficiency of Texas courts in these matters. Further, it promotes the uniformity, predictability, and certainty of decisions dictating who has the authority to bring these causes of action and how they must bring them. Based upon these factors, the court believes that Texas courts would choose to apply Texas law.

In order to prosecute a survival cause of action on behalf of an estate as a legal heir, a plaintiff must establish three things under Texas law. The plaintiff must allege (1) that no administration of the estate is pending, (2) that no administration is necessary, and (3) that the plaintiff is the sole owner of the claim for damages which survived to the decedent's heirs, legal representatives and estate. *See Lozano v. Smith*, 718 F.2d 756, 773, n. 38 (5th Cir. 1983). Plaintiffs have alleged none of these elements.

The court notes that even if it were proper to apply Mexican law, Plaintiffs have failed to provide any support for their allegation that under Mexican law they would have the authority to pursue these claims and limit the damages sought to be recovered. While the court was unable to uncover much relevant Mexican law, it did research the statutes cited by Plaintiffs in a memorandum to the court. Plaintiffs cited the "Civil Code of Federal District arts. 1281-1294, 1599-1791" for the proposition that these heirs could make and prosecute these claims directly on behalf of the estate. The only relevant article in the Mexican Civil Code the court could find, in the wide array of statutes cited by Plaintiffs, was Article 1289

which reads, "[e]ach heir may dispose of the right which he has in the estate; but he cannot dispose of the things which constitute the estate." The court was not provided with or able to find any case law interpreting this provision, but the last half of Article 1289 may prevent Plaintiffs from binding an estate to a compromise without including all other persons who have an interest in the estate. Therefore, the court finds that Plaintiffs would be precluded from making a binding damages limitation under Mexican law.

CONCLUSION

The court finds that under Texas law Plaintiffs have not shown they have the authority to limit the damages sought to be recovered by the estates in this lawsuit. Further, even if Mexican law controlled the question of Plaintiffs' authority to limit damages, these plaintiffs have not shown they have that authority. Therefore, the court finds that the amount in controversy exceeded $50,000 at the time this lawsuit was removed and this court has jurisdiction.

IT IS, therefore, ORDERED that Plaintiffs' motions to remand are DENIED.

IT IS further ORDERED that Plaintiffs' motion to strike Boeing's third-party complaint, on the basis of fraudulent joinder to create federal jurisdiction, and in the alternative to sever the third-party complaint, in order to remand the main action, should also be DENIED.

SIGNED this the 8th of June 1993.

RICHARD A. SCHELL
Richard A. Schell
United States District Judge

Decedents:	Removed to U.S.D.C. San Antonio (Rodriguez)	Filed in U.S.D.C. San Antonio (Penasco)	Removed to U.S.D.C. Los Angeles (Penasco)	Removed to U.S.D.C. Chicago (Penasco)	Removed to U.S.D.C. Los Angeles (Estavillo)	Filed in Super. Ct. Seattle (Wolf)	Removed to U.S.D.C. Beaumont (Torreblanca I)
David Alberto Aguilar Chavez (Charvel)	X				X	X	X
Alejandro Altschuler Mena					X	X	X
Mariana Altschuler Mena					X	X	X
(Miuriam) (Miriam) Pilar Mena de Altschuler					X	X	X
Lourdes Arizmendi Otaegui					X		
Imra Avila (Alejandra Rosales)		X	X	X			
Miguel Avila (Villanueva)		X	X	X			
Jamie Avila (Rosales)		X	X	X			
Maria Guadalupe de la Caridad Barrios Aviles					X	X	X
DALIA (HERNANDES) BAUTISTA[1]		X	X	X	X	X	X
SARA BAUTISTA		X	X	X	X	X	X
(Sarai Hernandes Bautista) Maria Estela Bautista Abarca					X	X	X
Carlos Eduardo Bautista Calderon					X	X	X
Eduardo Calderon Zavala					X	X	X
Gloria Calderon Sotomayor de Bautista					X	X	X
Liliana Bautista Calderon					X	X	X
MARIA EMILIA BOURLON CUELLAR (Bourlon)		X	X	X	X	X	X
Ofelia Casarin Alcibar					X	X	X
Augustin Castro Diaz					X	X	X
Vincente Centeno, Jr.		X	X	X			
(Christina) Ivonne Centeno (Melgosa)		X	X	X			
Vincente (Rodrigo) Centeno (Melgosa)		X	X	X			
Fernando Conteros, (Martinez) M.D.		X	X	X			
Maria del Refugio Cortina Cepeadez (Cuellar)					X	X	X
Peter Miles Cowland					X	X	X
Uri Cukier Shveid					X	X	X
Golda Shveid de Cukier (Gold)					X	X	X
Abraham Cukier Shveid					X	X	X
Ilan Cuckier Shveid					X	X	X
Adela Gomez Daza Cortina					X	X	X
Palmira de la Fuente (del) Rivero					X	X	X

[1] Claims filed against Boeing on behalf of the decedents whose names are capitalized were voluntarily dismissed by notice under Fed. R. Civ. P. 41(a) in both the Penasco action in San Antonio and the Penasco action in Los Angeles. Accordingly, all claims of those decedents and their beneficiaries against Boeing have already been adjudicated on the merits pursuant to that rule.

Decedents:	Removed to U.S.D.C. San Antonio (Rodriguez)	Filed in U.S.D.C. San Antonio (Penasco)	Removed to U.S.D.C. Los Angeles (Penasco)	Removed to U.S.D.C. Chicago (Penasco)	Removed to U.S.D.C. Los Angeles (Estavillo)	Filed in Super. Ct. Seattle (Wolf)	Removed to U.S.D.C. Beaumont (Torreblanca I)
Yolanda Benitez de la O					X	X	X
Hector Arturo de la O Benitez					X	X	X
Hector Arturo de la O Maciel					X	X	X
Susan (Elizabeth) Dick (Showalter)					X		
Daniel Avila Dick							
Horacio (Al Fonso) Estavillo Laguna	X				X	X	X
Maria de la Luz Diaz de Estavillo	X				X	X	X
Horacio Estavillo Diaz	X				X	X	X
Pedro Garcia Beltethon, M.D.		X		X			
Alma (Lourdes) Garcia (Ruiz)		X		X			
Jesus Gomez Hernandez	X	X		X	X	X	X
Teresa Hernandez de Gomez	X	X		X	X	X	X
Maria De La Luz (Natividad) Ibarra (Garcia) (Becerril)		X	X	X			
Carlos Ibarra (Garcia)		X	X	X			
Sandra Ibarra (Garcia)		X	X	X			
Maria Del Pilar Enterria Gomez		X	X	X			
Manual Gomez (Enterria)		X	X	X			
Pilar Gomez		X		X			
Patricia Gomez (Enterria)		X	X	X			
Rudolfo Guadarrama		X		X			
Carlos Alberto Guadarrama					X	X	X
Laura Guara de Romero			X				
Laura Pazos Guara			X				
Maria Eugenia Pazo Guara			X				
Rosa Elena Guillen (Ortega de Rodriguez)		X	X	X			
Juan Rodriguez (Morales)		X	X	X			
ANA ROSA GUZMAN FLORES		X	X	X	X	X	X
David Jasqui Noah					X	X	X
Raquel Noah (Kamaji) de Jasqui					X	X	X
Sofia Jasqui Noah					X	X	X
Teresa Jasqui Noah					X	X	X
Jacobo Jasqui Dabbah (Derbah) (Debbah)					X	X	X
ELIZABETH LARTILLEUX		X	X	X	X	X	X
JAVIER LARTILLEUX (XAVIER)		X	X	X	X	X	X
ERICK LARTILLEUX (ERIC)		X	X	X	X	X	X
PIERRE LARTILLEUX		X	X	X	X	X	X
CHANTAL LARTILLEUX		X	X	X	X	X	X
VIRGINIA LARTILLEUX		X	X	X	X	X	X
PIERRE, JR. LARTILLEUX		X	X	X	X	X	X
NATALIA LARTILLEUX		X	X	X	X	X	X
AYMERIC (J.) LARTILLEUX		X	X	X	X	X	X
Carmen Anzaldua de la Llata					X	X	X

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(Maria) Guadalupe Melgoza (Alvarado) (Ma. Del) Carmen Melgoza (Alvarado)		X X	X X	X X			
Margarita del Toral Merino Monica Merino del Toral Margarita Merino del Toral Marcella Merino del Toral (Celia)	X X X X				X X X X	X X X X	X X X X
Rafael Michel (Jimenez)		X	X	X			
Rafael Mujica Alarcon		X	X	X			
Luis Enrique Ojeda Santana					X	X	X
Rita (Maria Del Carmen Raigosa) Ortiz		X	X	X			
Rita Ortiz Villa Vicencio							
Rita Ortiz De Guadarrama							
(Ma. De La) Paz Ortiz (Villa Vicento Vda De. Raigosa)		X	X	X			
Nicolasa Ortiz		X	X	X			
Rosa Ortiz (De Velasco) Jose Ortiz (Margarito Velasco Ruiz)		X X	X X	X X			
Emma Ortiz (Banda)		X	X	X			
Liceo Palacios		X	X	X			
Lizeth Palacious Rodriguez							
Maria De La Luz Guadalupe Puente De Pardes							
Ma. De Lourdes Parades Puente							
Liliana Parades (Puente) Lulu (Maria) Parades		X X	X X	X X			
Maria Pardes (Espinosa)		X	X	X			
Pedro Ramirez Hernandez Patricia (Guadelupe) Martinez De Pardo (Tocaven) Rafael Jacobo Pardo (Martinez) Estrado		X X X	X X X	X X X			
Rafael Jacobo Pardo Patricio Pardo (Martinez) (Rafael) Javier Pardo (Martinez) Barbara Pardo (Martinez)		X X X X	X X X X	X X X X			
Sergio (Vincent) Paredes (Fernandez)		X	X	X			

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Katya Kohn Paz de Hernandez (Catia) (Katia)					X	X	X
Jorge Pazos			X				
Angel Carlos Penasco Espinosa		X	X	X			
Ana Leticia Perez Neyra		X	X	X			
Sylvia Rivera Perez de la Torre					X	X	X
Maria Isabel Domenge Munoz		X	X	X			
HIGINIO PIERDANT QUIROZ		X	X	X	X	X	X
Aida Ella Domenge De Pierdant		X	X	X			
Aida Pierdant Domenge		X	X	X			
Higinio Pierdant Domenge		X	X	X			
Sofia Pierdant Domenge		X		X			
Monica Pierdant		X	X	X			
Roberto Pinon Perez					X	X	X
Haydee Lorenzo de Pinon (Lozano)					X	X	X
Amelia Florencia Quesnel Galvan					X	X	X
Philip Lewes Piaget Rhorer (Lewis)					X	X	X
John Michael Rivaud	X				X		
Yayone Rivaud	X				X		
Jonathan Mikel Rivaud	X				X		
Peter Julien Rivaud	X				X		
Eduardo Ricardo Robinson Castro					X		
Maria Teresa Castro de Robinson					X		
Alberto Luis Robinson Rendon					X		
Gaspar Robles (Ramirez)		X	X	X			
Maria Rodriguez Zaldivar (MA Gabriela)	X				X	X	X
Anabel Rodriguez Zaldivar	X				X	X	X
Imelda Zaldivar Moreno de Rodriguez	X				X	X	X
(Maria Del) Pilar Rojas (Burgos)		X	X	X			
Genoveva Romero Vda de Baumgarten (Baumgarten de Baumgarten)					X	X	X
Julia Diaz Cobian de Rosales	X				X	X	X
Natael Gerardo Rosales Flores	X				X	X	X
Enrique Alejandro Sosa Rojas					X	X	X
Frederico (Javier) Ysunza Brena					X	X	X

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Augustin Ytuarte (Salazar)	X				X	X	X
(Maria Esther Juliana) Mercedes Zaldivar (Perez)		X	X	X			
Marisa Zaldivar		X		X			
Maria Esther (Juliana) Zaldivar (Perez)		X	X	X			
Dolores (Maritza) Paus Zaldivar			X				
Ricardo Zuniga Escobar		X	X	X			
TOTALS	20	72	69	72	78	69	69